



# Department of Public Health and Human Services

EXHIBIT 4

DATE 3.13.15

HB 576

Steve Bullock, Governor

Richard H. Opper, Director

Summary of Testimony of Geralyn Driscoll  
Office of Legal Affairs, (406) 444-5331, [gdriscoll@mt.gov](mailto:gdriscoll@mt.gov)  
House Human Services Committee  
March 13, 2015 HB 576

DPHHS opposes HB 576 because it is unconstitutional, it violates federal Medicaid statutes and it is unnecessary.

**HB 576 violates Article VI of the Montana Constitution.** *(The applicable sections of Article VI are attached.)*

Montana's executive power is vested in its Governor. Protecting public health and safety through licensing and certifying health care facilities and youth care facilities is an executive duty that Montana's Constitution requires the Governor, not the Attorney General, to perform. The regulatory power over health care, youth care facilities, etc., belongs to the Governor. The Legislature cannot by statute re-assign the Governor's constitutional powers and duties to the Attorney General.

Licensing health care and youth care facilities protects Montana's citizens when they are vulnerable – abused and neglected and at-risk children, the sick, the elderly and the disabled. It is the Governor, acting through the agencies created under Article VI § 7, not the Attorney General, who is responsible for determining that health care facilities in Montana meet licensing and certification requirements and youth care facilities and other residential facilities meet state standards. It is the Governor who is accountable to the people for the proper exercise of regulatory authority.

The Attorney General's function as the state's legal officer carries with it important duties that require legal expertise, but the Department of Justice (DOJ) is not a regulatory agency with expertise in health care or the selection and oversight of protective placements for children.

**HB 576 violates the federal Medicaid statutes by transferring certification functions to an agency that is not a health agency and is not under the authority of the Governor.** *(Copies of statutory authority are attached)*

For a health care facility to receive federal Medicare or Medicaid funds, it must meet the federal regulation certification standards. Millions of Medicare and Medicaid dollars are paid to hospitals and nursing homes across Montana based on DPHHS' survey and certification of health care facilities for compliance with the federal requirements. All states must cooperate and defer to the federal agency (CMS) if CMS disagrees with a survey finding. (A facility also must be licensed by the state and Montana also has licensing regulations.)

The Medicare and Medicaid statutes establish a complex system of certification and survey requirements. CMS has policies and procedures in place to assure itself that DPHHS is doing its job well. The federal government requires states to designate a single state agency to implement the Medicaid program and it requires a "state health agency, to carry out certification functions for health care facilities. DPHHS -- not DOJ -- is the state agency that has agreements with the federal government to implement the Medicaid state plan. DPHHS is Montana's "state health agency."

**There is no reason to move the licensing and certification functions from DPHHS.**

DPHHS efficiently and effectively certifies and/or licenses hundreds of facilities across the state. Statistics about the Department's certification and licensing work are attached. Montana's health care facilities receive millions of Medicare and Medicaid dollars for care provided in these certified and licensed facilities. Don't fix what is not broken. Just because the facilities themselves or third parties may disagree with a survey or inspection finding or a licensing action taken by DPHHS does not mean that DPHHS is not performing its licensing and certification functions well.

This work is done by skilled professionals -- Nurses, Chiropractors, Social Workers, Dietician Nursing Home Administrators, Engineers and Clinical Laboratory Scientists, for example -- who understand health care. They exercise independent professional judgment regarding compliance with federal regulations and state rules. This is not law enforcement or litigation, which properly belongs under the authority of the Attorney General. This is the protection of public health and safety through regulatory licensing and certification, which is an executive function of state government properly administered under the Governor.

DPHHS is also concerned about the scope of this bill. Although not stated in the title, it also moves the Department's authority to license youth care facilities and child-placing agencies to DOJ. The Child and Family Services Division of DPHHS currently performs this function. Moving it to DOJ will disrupt services essential to the safety and health of children in the Montana foster care system and children and families awaiting adoption through a private Child Placing Agency. Like the Medicaid program, this program is closely tied to federal law. The shift would put Title IV-E determinations in two different departments, subject to the authority of two different elected officials. It would create unnecessary and burdensome inefficiencies in the process. The entire Title IV-E determination process could not be transferred, as only part of it relates to licensing duties of the Department. Future federal Title IV-E reviews would be complicated and the state's funding could be at risk.

## Constitution of Montana -- Article VI -- THE EXECUTIVE

**Section 1. Officers.** (1) The executive branch includes a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor.

...

**Section 4. Duties.** (1) The *executive power is vested in the governor* who shall see that the laws are faithfully executed. He shall have such other duties as are provided in this constitution and by law.

...

(4) The attorney general *is the legal officer of the state* and shall have the duties and powers provided by law.

(5) The superintendent of public instruction and the auditor shall have such duties as are provided by law

...

**Section 15. Information for governor.** (1) The *governor* may require information in writing, under oath when required, from the officers of the executive branch upon any subject relating to the duties of their respective offices.

(2) He may require information in writing, under oath, from all officers and managers of state institutions.

(3) He may appoint a committee to investigate and report to him upon the condition of any executive office or state institution.

Examples of federal statutory references in the Medicare and Medicaid statutes to single state agency or state health agency.

42 USC §1395aa. Agreements with States. [This is also referred to as "Section 1864" because it is Section 1864 of the Social Security Act]

(a) Use of State agencies to determine compliance by providers of services with conditions of participation. The Secretary shall make an agreement with any State which is able and willing to do so under **which the services of the State health agency or other appropriate State agency** (or the appropriate local agencies) will be utilized by him for the purpose of determining whether an institution therein is a hospital or skilled nursing facility, or whether an agency therein is a home health agency, or whether an agency is a hospice program or whether a facility therein is a rural health clinic as defined in section 1395x(aa)(2) of this title, a critical access hospital, as defined in section 1395x(mm)(1) of this title, or a comprehensive outpatient rehabilitation facility as defined in section 1395x(cc)(2) of this title, or whether a laboratory meets the requirements of paragraphs (16) and (17) of section 1395x(s) of this title, or whether a clinic, rehabilitation agency or public health agency meets the requirements of subparagraph (A) or (B), as the case may be, of section 1395x(p)(4) of this title, or whether an ambulatory surgical center meets the standards specified under section 1395k(a)(2)(F)(i) of this title. . . .

*Emphasis added.*

42 U.S.C. 1396a

(a) A State plan for medical assistance must—

. . .

(5) either provide for the establishment or **designation of a single State agency to administer or to supervise the administration of the plan;** or provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan, except that the determination of eligibility for medical



## State Survey Agency Workload Report

CMS 434 Accomplished Workload for: Fiscal Year 2014

Provider Type	Facility Count	Initial Visit	Resurvey Visit	Follow-up Visit	Complaint Visit	Total Visits
ICF/MR	1	0	2	0	0	2
Nursing Facility XIX	1	0	2	1	0	3
Skilled Nursing Facility XVIII	1	0	1	0	0	1
Skilled Nursing Facility XVIII/XIX	81	4	160	31	60	255
Accredited Hospital – Validation	8	0	0	0	4	4
Non-Accredited Hospital	5	0	2	0	3	5
Psych Hospital – Accredited	1	0	0	0	0	0
Psych Hospital – Non-accredited	1	0	0	0	2	2
Critical Access Hospital – Deemed	3	0	0	0	0	0
Critical Access Hospital – Non-deemed	43	0	8	3	11	22
Swing Beds	48	0	5	0	0	5
PPS Exempt	8	0	0	0	0	0
Home Health Agency – Accredited	3	0	0	0	0	0
Home Health Agency – Non-accredited	24	0	10	0	0	10
Hospice – Deemed	2	0	0	0	0	0
Hospice – Non-deemed	25	0	4	0	0	4
Outpatient PT/SP Non-deemed	1	0	0	0	0	0
Comprehensive Outpatient Rehab	0	0	0	0	0	0
Rural Health Clinic – Deemed	0	0	0	0	0	0
Rural Health Clinic – Non-deemed	52	0	16	0	0	16
Ambulatory Surgical Center – Deemed	2	0	0	0	0	0
Ambulatory Surgical Center – Non-deemed	14	0	8	0	0	8
End Stage Renal Disease	12	0	8	4	1	13
Other: PRTF	3	0	0	0	1	1
Other: NATP	81	0	67	0	0	67
Total:	420	4	293	39	82	418

Date: March 6, 2015

Signature: *Carla Black*

Title: Administrative Support

## DPHHS Licenses and Certifications FY2014

### Surveys Completed

### Facilities Licensed in FY2014

Facility Type	# of Facility	Facility Type	# of Facility	Facility Type	# of Facility
Approved Chemical Dependency	34	Residential Chemical Dependency	27	Infirmery	5
Adult Day Care	68	End Stage Renal Dialysis	12	Long Term Care	84
Adult Foster Home	122	Home Health Agency	32	Mental Health Centers	26
Assisted Living	203	Home Infusion Therapy	13	Out Pt Center Primary Care	6
Outpatient Center For Surgical Services	18	Hospital	16	Out Behavioral Health	1
Critical Access Hospital	46	Hospice	39	Residential Treatment Facility	3
Chemical Dep. Center	10	ICF-MR/ICF-DD	1/1	Retirement Home	26
		Secured Crisis Stabilization	3	Specialty Mental Health	1
Youth Group Home	15	Child Care Agency	1	Community Homes for Dev. Disabled	153
Therapeutic Youth Group Home	57	Residential Treatment Facility	3		
		Youth Shelter Care	12		
<b>Total Number of Facilities</b>					<b>1039</b>

### Certifications in 2014

Provider Type	Facility Count	Initial Visit	Resurvey Visit	Follow-up Visit	Complaint Visit	Total Visits
ICF/MR	1	0	2	0	0	2
Nursing Facility XIX	1	0	2	1	0	3
Skilled Nursing Facility XVIII	1	0	1	0	0	1
Skilled Nursing Facility XVIII/XIX	81	4	160	31	60	255
Non-Accredited Hospital	5	0	2	0	3	5
Psych Hospital – Accredited	2	0	0	0	0	0
Critical Access Hospital – Deemed	45	0	8	3	11	22
Home Health Agency – Accredited	27	0	10	0	0	10
Hospice – Deemed	27	0	4	0	0	4
Rural Health Clinic – Non-deemed	52	0	16	0	0	16
Ambulatory Surgical Center – Deemed	16	0	8	0	0	8
End Stage Renal Disease	12	0	8	4	1	13
PRTF	3	0	0	0	1	1
<b>Total:</b>	<b>-</b>	<b>4</b>	<b>293</b>	<b>39</b>	<b>82</b>	<b>418</b>